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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-125

OTHA G. REE, JR., and LOCKHEED SHIPBUILDING AND CONSTRUCTON COMPANY,

Petitioners,

vs.

MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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vs.

MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioners, Otha G. Ree, and Lockheed Shipbuilding and Construction Company, respectfully pray that a writ of certiorari issue to review the final order of the Court of Appeal of the State of California Second Appellate District entered May 23, 1972 denying a petition for a writ of prohibition.

Opinions Below.

There were no opinions by the state courts below. In each instance, the petitions filed by petitioners were denied without opinion by the appellate courts of California. Neither the order of the California Court of Appeal denying the petition for a writ of prohibition, nor the order of the California Supreme Court denying the petition for a hearing is officially reported, and each is attached hereto in Appendix A.

Jurisdiction.

The final order of the California Court of Appeal was entered on May 23, 1972. A timely petition for a hearing to the California Supreme Court was denied by that court on June 29, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Question Presented.

Whether petitioners' successive criminal prosecutions on charges of maintaining an unsafe place of employment at the same location on July 16, 1971 and on June 22, 23, and 24, 1971, deprive petitioners of liberty and property without due process of law in violation of Section I of the Fourteenth Amendment to the United States Constitution, when all facts necessary to filing the second prosecution arose out of the same nucleus of facts as in the first prosecution and were known to the State prior to the filing of the first prosecution, each prosecution alleges violations of the same or similar statutes, and all charges could have been joined without prejudice to the State or to petitioners?

Constitutional Provision Involved.

Section I of the Fourteenth Amendment to the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property; without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved.

The relevant sections of the California Labor Code are as follows:

> "Section 6400. *Safe employment and place of employment*
>
> "Every employer shall furnish employment and a place of employment which are safe for the employees therein."
>
> "Section 6401. *Safety devices and safeguards*
>
> "Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees."

"Section 6402. *Employee in unsafe employment or place*

"No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe."

"Section 6404. *Occupancy or maintenance of unsafe place*

"No employer shall occupy or maintain any place of employment that is not safe."

"Section 6414. *Misdemeanors; prima facie evidence of violation; burden of proof of compliance*

"Except where another penalty is specifically provided, every person is guilty of a misdemeanor who does any of the following:

"(a) Violates any safety provision or part thereof in, or authorized by, this part.

"(b) Fails or refuses to comply with any such safety provision or any part thereof.

"(c) Directly or indirectly, knowingly induces another so to do."

* * *

"Section 6416. *Death from employer's gross negligence; punishment*

"Every employer who, through his gross negligence in failing to provide a safe employment and place of employment, causes the death of his employee is punishable by imprisonment in the county jail for not more than one year or by a fine of not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000)."

Statement of the Case.

Petitioner Lockheed Shipbuilding and Construction Company ("Lockheed") was at all times relevant hereto in charge of excavating and constructing the Sylmar tunnel project in the San Fernando Valley pursuant to a contract with the Metropolitan Water District of Southern California. Petitioner Ree was employed by Lockheed as Project and Safety Engineer.

On June 23, 1971, there occurred a flash fire within the tunnel which resulted in several injuries, and on June 24, 1971, there occurred an explosion within the tunnel which resulted in 17 deaths and several injuries. On June 27, 1971, the State Division of Industrial Safety (hereinafter the "Division") declared the tunnel to be an unsafe place of employment. From June 24, 1971, to and including July 16, 1971, Lockheed personnel and Division personnel conducted rescue, recovery, repair and maintenance operations in the tunnel.

On or about June 27, 1971, the Division commenced an investigation into the cause of the explosion. On August 30, 1971, by letter to Roger Arnebergh, Los Angeles City Attorney, the Division requested prosecution of petitioners for Labor Code offenses which were allegedly committed on June 23 and 24, 1971. (App. B at 3.) On August 30, 1971, the Division also transmitted its investigatory file to the City Attorney. The file included statements from all key witnesses to the events preceding the explosion. (Affidavit of Don H. Terry, App. B at 11.)

On September 2, 3 and 24, 1971, a representative of the City Attorney attended California State Assembly hearings on the subject of the Sylmar tunnel dis-

aster. Those hearings elicited extensive testimony regarding the events surrounding the Sylmar tunnel disaster, including an entry into the tunnel by Lockheed personnel and a police officer on July 16, 1971.*

On November 21, 1971, almost five months after the tunnel disaster, a misdemeanor complaint was filed entitled *The People of the State of California v. Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr.*, No. 402085, hereinafter referred to as the "first prosecution." The complaint did not, as was previously requested by the Division in its letter, seek to prosecute for Labor Code offenses allegedly committed on June 23 and 24, 1971. Instead the complaint alleged that on July 16, 1971, petitioners Ree and Lockheed furnished employment and a place of employment which were unsafe for employees (Labor Code §6400); required an employee to go and be in an employment or place of employment which was not safe (Labor Code §6402); failed and neglected to do everything reasonably necessary to protect the life and safety of employees (Labor Code §6403); and occupied and maintained an unsafe place of employment (Labor Code §6404).

These allegations in the first prosecution were based upon the theory that petitioners permitted and required an employee to enter and work in the tunnel on July 16, 1971, at a time when the tunnel was unsafe due to the events of June 24, 1971. Specifically, the thrust of the State's case at trial was that the tunnel was unsafe on July 16, 1971 because the dangerous levels of gases and inadequate ventilation which were present

*A copy of the official transcript of those hearings is on file in respondent court.

at the time of the explosion on June 24, 1971, were likely to remain and reoccur, and because petitioners utilized insufficient rescue procedures and equipment. It was never asserted at trial that anything occurred after June 24, 1971, to make the tunnel any more unsafe than it was as of that date. On February 25, 1972, following a trial of four weeks' duration, all charges were resolved by either verdicts of acquittal or orders of dismissal.*

On March 30, 1972, a second complaint was filed entitled *The People of the State of California v. Lockheed Shipbuilding and Construction Company, et al.*, No. 413019, hereinafter referred to as the "second prosecution." This complaint in relevant part alleges that petitioner Lockheed on June 22, 23 and 24, 1971 and petitioner Ree on June 23 and 24, 1971, furnished employment and a place of employment which were unsafe (Labor Code §6400); failed to furnish safety devices and safeguards and to adopt and use practices, methods, and operations which were reasonably adequate to render the tunnel safe (Labor Code §6401); required employees to go and be in an unsafe employment or place of employment (Labor Code §6402); and occupied and maintained an unsafe place of employment (Labor Code §6404). The complaint also alleges that petitioners caused the deaths of 16 employees through their gross negligence in failing to provide a safe employment and place of employment on June 24, 1971 (Labor Code §6416).

---

*Violations of other sections of the Labor Code and of California Penal Code §135 (concealing evidence—the gas testing device used at the time of the explosion) were also alleged but are not relevant to the issues raised by this petition. Lockheed was convicted on the Penal Code §135 charge and is presently appealing this conviction.

Prior to the time of filing the complaint in the first prosecution, the State was aware of all the basic facts underlying each and every one of the charges subsequently brought in the second prosecution. The same or similar sections of the California Labor Code are involved in each prosecution. Also, pursuant to California Penal Code §954, the two prosecutions could have been joined without prejudice to either the State or petitioners.

The trial in the second prosecution which is currently scheduled to commence July 24, 1972, is estimated to last eight to ten weeks with testimony not expected to begin until August 1, 1972.

Presentation of the Federal Question Below.

On May, 8, 1972, respondent municipal court denied petitioners' various motions to dismiss which had been based on state statutory and decisional grounds and state and federal constitutional grounds.

On May 12, 1972 petitioners filed original proceedings in the Los Angeles Superior Court, No. C 29671, seeking a writ of prohibition to restrain respondent court from proceeding with the trial of the second prosecution. The federal question for which review by this Court is sought was stated therein as follows:

> "[I]t is petitioners' position that the actions of the People in this case in arbitrarily causing petitioners to undergo the expense and humiliation of two long and complex trials, involving closely connected facts, events and issues, when there was no justification for doing so is fundamentally unfair and constitutes a denial of due process." (Memorandum of Points and Authorities in Support of Petition for Writ of Prohibition at 2.)

On May 15, 1972 the petition was summarily denied.

On May 17, 1972, the date originally set for commencement of the trial in the second prosecution, petitioners sought a writ of prohibition in the California Court of Appeal, 2nd Civ. No. 40323, and raised in virtually identical language the federal question raised in the Superior Court.

On May 23, 1972, the California Court of Appeal denied the petition without opinion. Upon a petition for hearing being filed with the California Supreme Court, the petition for a writ of prohibition and accompanying memorandum of points and authorities in the California Court of Appeal raising the federal question hereinabove described automatically became the record and the brief before the California Supreme Court. With said record and brief before it, the California Supreme Court summarily denied the petition for hearing on June 29, 1972. Because the California Supreme Court's denial of a petition for hearing is discretionary, it is the California Court of Appeal to which this Court's writ of certiorari, if granted, should properly issue. See *Hammerstein v. Superior Court,* 341 U.S. 491 (1951).

Reasons for Granting the Writ.

Multiple prosecution of petitioners for offenses based on a common nucleus of facts under the circumstances of this case raises an important constitutional question under the Due Process Clause of the Fourteenth Amendment.

Requiring petitioners to undergo the expense and humiliation of two long and complex criminal trials, arising out of the same nucleus of facts and involving closely connected facts, events and issues, is fundamentally unfair and constitutes a denial of due process in violation of the Fourteenth Amendment of the United

States Constitution. Petitioners recognize that their second prosecution is not barred by the double jeopardy clause nor this Court's recent interpretation of the double jeopardy clause in *Ashe v. Swenson*, 397 U.S. 436 (1970) and did not urge that ground below. It is not petitioners' position that the second prosecution involves the "same offense" as did the first prosecution. However, the policies underpinning the double jeopardy clause, as well as other policy and practical considerations support the due process rule petitioners advance.*

Such a rule would require compulsory joinder in a single prosecution of all criminal offenses against an individual which are known to the prosecutor and are within his jurisdiction, if the offenses charged are based on the same conduct or course of conduct, or arise from the same criminal episode, or are based on the same nucleus of facts. The policy in support of this rule was stated by this Court in *Green v. United States*, 355 U.S. 184, 187-188 (1957), a double jeopardy case, as follows:

> "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense,

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*It might be argued that in *Hoag v. New Jersey*, 356 U.S. 464 (1958), the Court held by a divided court, that multiple prosecutions of related offenses were not in violation of the due process clause of the Fourteenth Amendment in the facts of that case. (Warren, C. J.; Black, J. and Douglas, J. dissenting.) *Hoag* was overruled on its facts by *Ashe v. Swenson*, 397 U.S. 436 (1970) which held the doctrine of collateral estoppel to be embodied in the double jeopardy clause of the Fifth Amendment which was made enforceable against the states in *Benton v. Maryland*, 395 U.S. 784 (1969). Moreover, since this Court's decision in *Hoag*, notions of what constitutes fundamental fairness have expanded and changed, and events have occurred which indicate that the question of whether a rule of compulsory joinder of criminal offenses related in their commission by the same nucleus of facts, criminal episode or course of conduct is required by due proess, is ripe for consideration by this Court.

> thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ."

Though originally written to apply to the "same offense," the concept articulated by this language applies equally to different offenses related in their commission by the same nucleus of facts, criminal episode, or course of conduct. *Cf.* the concurring opinion of Mr. Justice Brennan, *Ashe v. Swenson, supra,* at 448-460.

As noted in *Green, supra,* a criminal trial is an "ordeal." It is an ordeal for the defendant emotionally, mentally, and financially. In view of this, an individual charged with criminal offenses should have to endure as few criminal trials in his life as is reasonably possible. In cases where one trial would suffice, and in which all criminal charges outstanding against an individual arising out of the same nucleus of facts could be handled in that one trial without prejudice to the state or defendant, only one trial should be permitted. In addition to according defendants due process of law guaranteed them by the Fourteenth Amendment, such a rule would prevent the needless waste of court time, waste of public funds and needless repetition of evidence, which are now caused by a failure to join criminal offenses related in their commission as is evident in the instant case.* Such a compulsory joinder

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*Much of the lengthy proceedings and testimony which occurred in the first prosecution on many subjects and issues would be necessarily duplicated in the second prosecution. In the first prosecution much time and effort was involved in acquainting the court and jury with such matters as the physical layout, dimensions and appearance of the tunnel project, above ground as well as within the tunnel; the tunnel's electrical system; the communication methods and equipment; the tunnel's transportation system; the tunnel's ventilation system; the safety methods

(This footnote is continued on next page)

rule has been recommended by commentators, see *Carroway Pervasive Multiple Offense Problems—A Policy Analysis,* 1971 Utah L. Rev. 105, 117-19; and has been fashioned by English Courts from principles derived from the common law. *Connelly v. Director of Public Prosecutions,* [1964] A.C. 1254, 1359-60. A similar rule has also been recommended by the National Commission on Reform of Federal Criminal Laws in their *Study Draft of a New Federal Criminal Code* §703(2) (1970).

Further, the criminal case load at both the federal and state levels has continued to grow and become further burdened at an increasing rate. For example, in California alone, between the years 1965 and 1970, the number of criminal cases awaiting trial in the 16 largest counties nearly tripled. 1971 *Report of the Administrative Office of the California Courts,* pp. 100-126.

Moreover, the appropriateness of applying such a compulsory joinder rule in this case is further made apparent by the nature of the statutory scheme under which petitioners are being prosecuted. Each day's

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and equipment utilized; the construction methods and equipment used at the project; the personnel who worked at the project, including the identity, skills, duties, functions, schedules and authority of the various managers, engineers, supervisors, and construction employees; the personnel responsible for safety matters at the tunnel, including petitioners' employees and representatives of the Division, and the duties and authority of each; the gas meter which was used to detect dangerous levels of gas, including its physical appearance, method of operation, method of calibration after the flash fire of June 23, 1971, and immediately prior to the explosion of June 24, 1971, and the facts surrounding its subsequent recovery, custody, and testing; the relative safety of the project prior to the explosion of June 24, 1971, including the inspection trip made by Division representatives on June 23, 1971; and the physical appearance of the tunnel subsequent to the June 24, 1971 explosion.

continuance of any violation of the sections under which petitioners are charged constitutes a separate and distinct offense. California Labor Code §6415. For example, petitioners' second prosecution concerns the events of June 22, 23 and 24, 1971. The first prosecution concerned events at the same place of employment on June 16, 1971. Without adoption of a rule prescribing more equitable and ascertainable standards limiting the number of successive prosecutions, petitioners could have been subject to separate criminal trials for each of the intervening dates between the two prosecutions which have already been filed. The State in these subsequent prosecutions may argue, as it has below, that the conditions in the tunnel varied on each of those intervening dates—more or less gas or a different kind of gas could have been in the tunnel on those dates—thus precluding petitioners from effectively asserting the double jeopardy-collateral estoppel defense made available by *Ashe, supra.*

Certainly, the state should not be entitled to separate trials for each day of violation. Petitioners submit that the rule which is required by the due process clause, and which is most in accord with the fair and efficient administration of the Anglo-American system of criminal justice as it is presently constituted, is one limiting the number of criminal prosecutions brought against an individual to as few as is necessary. For petitioners to be required to endure two lengthy, duplicative, expensive and highly-publicized trials for the closely related charges arising out of the Sylmar tunnel explosion, when there is no good reason for doing so, is simply indefensible from a standpoint of either fundamental fairness or the sensible administration of criminal justice.

Conclusion.

For the foregoing reasons, it is urged that this petition for writ of certiorari be granted.

Respectfully submitted,

CHARLES G. BAKALY, JR.,
Attorney for Petitioners.

Of Counsel:

DON H. TERRY,
HOLLOPETER & TERRY,
RICHARD N. FISHER,
GORDON E. KRISCHER,
O'MELVENY & MYERS,

July 20, 1972.

APPENDIX A.

Order of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Lockheed Shipbuilding and Construction Company, et al., Petitioners, vs. Municipal Court, Respondent. Civil No. 40323.

Loren G. Savage, et al., Petitioners, vs. Municipal Court, Respondent. Civil No. 40331.

The People, Petitioners, vs. Municipal Court, Respondent. Civil No. 40347.

Filed: May 23, 1972.

THE COURT:

In each of the above entitled proceedings, the petition is denied.

To give petitioners the opportunity to petition the Supreme Court, the temporary stay of the trial in the case entitled People v. Lockheed Shipbuilding and Construction Company, et al., Los Angeles Municipal Court No. 413019 as ordered by this court on May 17, 1972, is continued in effect for 10 days from the date of this order unless sooner vacated by order of this court or of the Supreme Court.

Order Denying Hearing After Judgment by the Court of Appeal.

Order Due July 21, 1972.

In the Supreme Court of the State of California, in Bank. 2nd District, Division 4, Civil No. 40323, Civil No. 40331, Civil No. 40347.

Lockheed Shipbuilding & Construction Company Et Al. v. Municipal Court, Los Angeles Judicial District (And Companion Cases)

Petition for hearing DENIED.

McComb, J., is of the opinion that the petition should be granted.

Wright, Chief Justice

Filed June 29, 1972.

APPENDIX B.

Ronald Reagan, Governor

State of California—Human Relations Agency
Department of Industrial Relations
Division of Industrial Safety
3460 Wilshire Boulevard, Los Angeles,
California 90005

August 30, 1971

Mr. Roger Arnebergh
Los Angeles City Attorney
Room 2101, City Hall
Los Angeles, California 90012

Dear Sir
This Division sets forth the following circumstances to wit:

Defendants:

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
A. M. Folden, President

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
R. N. Waters, Vice President

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
W. E. McDanniel, Manager-Const. Division

Lockheed Shipbuilding and Construction Company
2929 16th Avenue SW
Seattle, Washington 98134
R. E. Hix, Manager-Construction Division

Lockheed Shipbuilding and Construction Company
12800 Fenton Avenue
Sylmar, California 91342
L. G. Savage, Project Manager

Lockheed Shipbuilding and Construction Company
12800 Fenton Avenue
Sylmar, California 91342
O. G. Ree, Project Engineer

Lockheed Shipbuilding and Construction Company
12800 Fenton Avenue
Sylmar, California 91342

Complainants:

George O. Denton
Safety Engineer—Construction
State of California
Department of Industrial Relations
Division of Industrial Safety
3460 Wilshire Boulevard, Room 910
Los Angeles, California 90010
Telephone: 381-3951

Wallace J. Zavattero
Safety Engineer—Construction
State of California
Department of Industrial Relations

Division of Industrial Safety
3460 Wilshire Boulevard, Room 910
Los Angeles, California 90010
Telephone: 381-3951

Date of Offense:

June 23, 1971 and June 24, 1971

Location:

San Fernando Tunnel Project
12800 Fenton Avenue
Sylmar, California 91342

Statement of Conditions: At the above location in the City of Los Angeles, the defendants, or some of them, on June 23rd and 24th, 1971 directed that a tunnel excavation be made. Said excavation was proceeding and defendants, or some of them, failed to provide the necessary safeguards so as to afford their employees and invitees a safe place of employment. Said defendants, or some of them, were in the process of directing said employees in said tunnel excavation work when an explosion took place that was the actual and proximate cause of death for sixteen (16) employees and one (1) inspector employed by the Metropolitan Water District of Southern California.

Names of workers killed in the accident:

1. Forrest E. Aldrich
2. William I. Ashe
3. Robert E. Ballow
4. Danny J. Blaylock
5. Jose R. Carrasco
6. William Carter
7. Ronald E. Demo
8. John P. Drobot

9. Mike Guitierrez
10. Gary A. Nichols
11. Russell M. Overstreet
12. Jonas V. Peters
13. William J. Snodgress
14. Alvin H. Spreen
15. Robert K. Stowers
16. Robert W. Warner
17. Louis L. Richardson (Inspector for M.W.D.).

Count No. 1: Labor Code 6400. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violations of Section 6414 of the California Labor Code in that they failed to comply with the provisions of California Labor Code Section 6400 and the California Administrative Code, Title 8, Tunnel Safety Orders 8410, (a) (c), 8422 (a) (b), 8425 (a) (b) (c), 8431 (a) (c) (d) (e) by reason of their failure to furnish a safe place of employment for their employees.

Count No. 2: Labor Code 6401. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code Section 6401 which states that every employer shall furnish and use safety devices and safeguards which are reasonably adequate to render such employment and place of employment safe.

Count No. 3: Labor Code 6402. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code Section 6402 which

stipulates that no employer shall require or permit any employees to go or be in any employment or place of employment which is not safe.

Count No. 4: Labor Code 6403: It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code 6403 in that no employer shall fail or neglect: (a) To provide and use safety devices and safeguards. (b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe. (c) To do every other thing reasonably necessary to protect the life and safety of employees.

Count No. 5: Labor Code 6404. It is alleged that the defendants committed an act and/or acts which constitute a misdemeanor; to wit: Violation of Section 6414 of the Labor Code in that they failed to comply with the provisions of Labor Code 6404 which states that no employer shall occupy or maintain any place of employment that is not safe.

Count No. 6: Labor Code 6416. It is alleged that the defendants through their gross negligence in failing to provide a safe employment and place of employment, caused the death of their employees (listed above) and should be punished by imprisonment in the county jail for not more than one year or by a fine of not less than one thousand dollars ($1000) nor more than five thousand dollars ($5000).

Facts: The following Tunnel Safety Orders were violated:

Tunnel Safety Order 8410. General. (a) Every reasonable precaution shall be taken to insure the

safety of the workmen in all cases, whether or not provided for in these orders. (c) No man shall be required to work in an unsafe place unless for the purpose of making it safe, and then only after proper precautions have been taken to protect him while doing such work.

Tunnel Safety Order 8422. Oxygen Breathing Apparatus. (a) At all tunnels where flammable or noxious gases are encountered or anticipated, there shall be provided and properly maintained permissible self-contained oxygen breathing apparatus, in number and type as the division so directs. A sufficient supply of replacement parts and regenerating material shall be maintained. Where there is more than one tunnel operated by the same employer as one project, only one group of five (5) sets of oxygen breathing apparatus will be required. Apparatus shall be kept in repair and ready for use at all times.

(b) Where the apparatus is required by the division there must be enough physically fit and trained men outside the tunnel to provide one or more crews of five (5) men within reach by telephone or other means and available for service at the tunnel within two hours. Training shall be given annually and shall be at least equivalent to that offered by the U. S. Bureau of Mines. These men shall be required to practice at least thirty (30) minutes a month in the use of the apparatus.

Tunnel Safety Order 8425. Dangerous or Poisonous Gases. (a) When the air in any part of a tunnel is known to contain or is suspected of containing an

explosive gas, it shall be tested by means of a permissible miner's safety lamp, or by other means acceptable to the Division of Industrial Safety before men are allowed to work therein. These tests shall be made by a man who is competent to make them. If the main return air in the tunnel contains more than one percent by volume of an explosive gas, any work therein shall be conducted with extreme care and steps shall be taken to improve ventilation. The tests shall then be made at least every four hours during the working shift and the Division of Industrial Safety notified of the condition.

(b) When two percent (2%) or more of an explosive gas or a poisonous or suffocating gas in concentrations dangerous to life is encountered, normal operations shall cease in those places, except that under competent direction, necessary steps may be taken to make the place safe. The Division of Industrial Safety shall be notified when such conditions are encountered.

(c) Before installing or using any electrical equipment in places containing methane gas or other explosive gases, the Division of Industrial Safety should be advised of the actual conditions. Such installations or operations must comply with existing Electrical Safety Orders and may be subject to specific orders to be issued by the division.

Tunnel Order 8431. Ventilation. (a) Fresh air shall be delivered in adequate quantities to all underground

work areas. The supply shall at least be sufficient to prevent dangerous or harmful accumulations of dust, fumes, vapors or gases, and shall not be less than 30 feet per minute in those tunnels where blasting or rock drilling is conducted, or where there are other conditions that are likely to produce dusts, fumes, vapors or gases in harmful quantities. The ventilation system shall be so arranged that the air flow can be reversed if a fire or some other emergency makes this advisable. (Also, see Order 8440)

(d) No man, unless he is wearing permissible self-contained oxygen breathing apparatus shall be permitted to work in a place where a flame safety lamp or a candle will not burn.

(e) Where flammable gas is encountered normal operations cannot proceed unless sufficient air is furnished to hold the percentage of flammable gas to not more than one per cent (1%) by volume in the return air of the tunnel. (See Order 8425)

Note: Copy of Tunnel Safety Orders is attached.

Exhibits: (Will be duplicated and forwarded under separate cover.)

Witnesses: (Testimony of witnesses will be forwarded under separate cover)

This Division, therefore, requests that a complaint of gross negligence be issued against subject employer.

Very truly yours

H. A. Crabtree
Senior Safety Engineer

/rp

Affidavit of Don H. Terry in Support of Motion Under P.C. 654.

In the Municipal Court of the Los Angeles Judicial District County of Los Angeles, State of California.

The People of the State of California, Plaintiff, v. Lockheed Shipbuilding and Construction Company, a corporation doing business in California, and Loren G. Savage, Otha G. Ree, Jr., Russell Van Guilder, Eugene Pedigo, Defendants. No. 413019.

AFFIDAVIT OF DON H. TERRY

State of California, County of Los Angeles—ss.

DON H. TERRY deposes and says:

That your affiant is an attorney licensed to practice law before all of the Courts of the State of California.

That on or about November 22, 1971, the office of the City Attorney for the City of Los Angeles, California, by and through Deputy City Attorney George D. Bane, caused to be filed a criminal complaint against Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr., being case number 402085 in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, charging Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr., with seven Counts of violating the provisions of the Labor Code of the State of California, and one Count charging a violation of Penal Code Section 135 (concealing evidence).

That prior to February 10, 1972, that matter proceeded to trial and trial was completed resulting in Lockheed Shipbuilding and Construction Company being convicted of violating Section 135 of the California State Penal Code, the rest of the Counts against

said defendant being either dismissed or the defendant being found not guilty thereof, and all Counts against Otha G. Ree Jr., being either dismissed or defendant being found not guilty thereof.

That in the first case filed against the defendants herein, number 402085, your affiant made a discovery motion in Division 59 of the Municipal Court of the Los Angeles Judicial District seeking, among other things, all photographs, signed or unsigned statements of witnesses, notes of investigating officers, recordings, engineer's reports, and official investigation reports of the explosion in the Sylmar tunnel which occurred on June 23, 1971. This discovery motion was granted.

On December 22, 1971, your affiant, pursuant to said discovery order, went to the office of the City Attorney where he met with Deputy City Attorney George D. Bane. In Mr. Bane's office on December 22, 1971, your affiant talked with Mr. Bane regarding the discovery motion and the facts relating to the explosion at the Sylmar tunnel and events that occurred subsequent thereto.

Mr. Bane related to your affiant, among other things, that Mr. Bane had been assigned to the "Lockheed case" for three months prior to December 22, 1971. That during this three months period he had made visits to the Sylmar tunnel, conferred at length and in great detail with witnesses pertaining to the cause of the tunnel explosion, the condition of the tunnel prior to the explosion and at the time of the explosion, and had complied a complete and thorough file on this tunnel explosion case.

Mr. Bane directed my attention to a stack of documents on his desk stating that those were all of the re-

ports of the investigation and statements of witnesses and I could have copied any of the documents I desired.

I spent approximately four and one half hours in Mr. Bane's office that afternoon together with a man who made photocopies of the documents.

Among the documents photocopied were statements given by Henry McIntyre, Ralph Brissette, Arvid Rasmussen, Wallace Zavattero and George Denton.

There were also present in the file orders and letters made by the State Division of Industrial Safety pertaining to the Sylmar tunnel both before and after the explosion on June 24, 1971.

Deputy City Attorney George D. Bane told your affiant that he had been assigned to this case to gather information for the prosecution of Lockheed Shipbuilding and Construction Company, and others, pertaining to the deaths that were caused by the explosion. That he had accumulated so much evidence against Lockheed Shipbuilding Company and Otha G. Ree, Jr., that there was no way they could "win" the case, referring to Lockheed and Ree.

Contained among the hundreds of documents on Mr. Bane's desk were statements by Wallace Zavattero pertaining to his inspections of the Sylmar tunnel, *including June 23, 1971,* and copies of the orders he issued both before and after the tunnel explosion. Included in the hundreds of exhibits were photographs of the deceased parties together with their identification.

There was also a statement from Henry McIntyre which said in substance that on June 22, 1971 he was employed by Lockheed and that Savage and Ree were his supervisors. That Van Guilder was his immediate

supervisor. That he worked in the Sylmar tunnel on that date and operated the mining machine during the shift. That five hours before his shift ended he began to smell a strong odor of crude oil and gasoline. That the odor got stronger. That the gas burned his eyes, nose and throat. That during the last hour the odor and gas made him sick. That he informed Van Guilder of the conditions and that other workers complained. That during the last hour of the shift he had to leave the machine to go and get fresh air. That he knew about the oil because he had worked in the oil fields and could recognize the smell.

Included in the numerous documents was the statement of Arvid Rasmussen to the effect that on June 23, 1971, he was employed by Lockheed and that his supervisors were Savage and Ree. That he was required to work in the tunnel and during the swing shift of June 23, 1971, he was operating an explosion meter testing for gasses. He tells of his tests made during that shift and the readings and of his informing Mr. Savage of the high readings. That there was a strong smell of crude oil in the tunnel and it was burning the eyes and throats of the workers. He tells, in this statement, of a minor explosion occurring earlier and that the entire tunnel, expecially along the heading, smelled of a strong gasoline and crude oil odor.

Included among the many documents is the statement of Ralph Brissette that he was employed by Lockheed as a brakeman in the tunnel. That on the evening of June 21, 1971, and the morning of June 23, 1971, Savage was present in the tunnel. He details in his statement the explosive meter readings registered from 1 to 19% and of the ignition sources that were present and the smell of gas.

Each of the statements that I saw in Mr. Bane's office was in substance the same as those attached to the complaint in the instant case, Case Number 413019.

In addition to the statements of these witnesses there were statements of investigators, photographs, copies of orders from the Division of Industrial Safety, daily logs of workmen and the like.

Your affiant is informed and believes, and upon such information and belief avers that George Denton and Wallace Zavattero, the signators of the complaint, case number 413019, are the same persons who signed the prior complaint in Case Number 402085. That Arvid Rasmussen, listed as a witness in Case No. 402085, to which a statement is attached is the same Arvid Rasmussen who is listed as a witness in the present case, Case Number 413019, to which a summary of his testimony is attached.

Your affiant is informed and believes, and upon such information and belief avers, that George D. Bane, Deputy City Attorney, had in his file at least thirty days prior to November 22, 1971, the statements of each of the above named witnesses and sufficient information upon which to base and file a complaint identical to the one here filed in Case Number 413019 at the time he caused to be filed a misdemeanor complaint in Case Number 402085.

I certify and declare under penalty of perjury the foregoing is true and correct.

Executed at Pasadena, California, this 14th day of April, 1972.

DON H. TERRY

ORIGINAL COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-125

RECEIVED
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SUPREME COURT, U.S.

OTHA G. REE, JR., and LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY,

Petitioners,

vs.

MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

It is respectfully submitted that the order of the California Court of Appeal correctly disposes of this case. Respondent submits that petitioners seek to ignore the factual determination by the trial judge in the case out of which this

matter arises, and that for this reason and the reasons that follow herein the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

On November 22, 1971, a misdemeanor complaint was filed against Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr. alleging that on or about July 16, 1971 defendants in that case, Municipal Court Number 402085, violated §135 of the California Penal Code and §§ 6315, 6400, 6402, 6403(c), 6404, 6406(a) and 6511 of the California Labor Code. This was the case which was labeled by petitioners as the "first prosecution."

The complaint in Case Number 402085 sets forth the trust of the prosecutions case as being that defendants, Lockheed Shipbuilding and Construction Company and Otha G.Ree, Jr. committed the following acts in the City of Los Angeles on or about July 16, 1971: . . . .

" . . . being then and there a person knowing that a matter and

thing to-wit: A Mine Safety Appliance Company Model 2-A combustible gas indicator was about to be produced in evidence upon a trial, inquiry and investigation, authorized by law did wilfully and unlawfully destroy and conceal the said combustible gas indicator with intent thereby to prevent it from being produced at said trial, inquiry and investigation."

(From Count I, People's Complaint, Case Number 402085)

" . . . entering a place being unaccompanied by a representative of the California State Division of Industrial Safety and without first obtaining written permission of the California State Division of Industrial Safety to so enter, which place was under order of the California State Division of Industrial Safety not to be entered by any person unless accompanied by a representative of the State Division of Industrial Safety and unless

written permission of the State Division of Industrial Safety was first obtained."

(From Count II, People's complaint, Case Number 402085)

" . . . entering and requiring one Arvid Rasmussen, an employee, to enter the shaft and tunnel portion of a tunnel construction project in the Sylmar area of Los Angeles, California after said tunnel and shaft portion had been inspected and determined to be unsafe by the California State Division of Industrial Safety."

(From Count III, People's complaint, Case Number 402085)

" . . . requiring and permitting one Arvid Rasmussen, an employee, to enter the shaft and tunnel portion of a tunnel construction project in the Sylmar area of Los Angeles, California, after such tunnel and shaft portion had been inspected and determined to be unsafe by the

California State Division of Industrial Safety."

(From Count IV, People's complaint, Case Number 402085)

" . . . did wilfully and unlawfully remove, displace, damage, destroy and carry off a safety device and safeguard furnished for use in an employment and place of employment to wit: One (1) Mine Safety Appliance Company 2-A combustible gas indicator."

(From Count VII, People's complaint, Case Number 402085)

" . . . did wilfully and unlawfully use and operate a place of employment after a notice of prohibition of use was attached to such place of employment by the California State Division of Industrial Safety pursuant to Section 6510 of the Labor Code of the State of California and before the said place of employment was made safe and before the required safeguards, safety appliances and devices were

provided."

(From Count VIII, People's complaint, Case Number 402085)

On March 27, 1972 a misdemeanor complaint was filed in the Municipal Court of the Los Angeles Judicial District against Lockheed Shipbuilding and Construction Company, Loren G. Savage, Otha G. Ree, Jr., Eugene Pedigo and Russell Van Guilder alleging in 80 counts that on or about June 22, 23, and 24, 1971, defendants in that case Municipal Court Number 413019 violated §§ 6416, 6400, 6401, 6402, 6404 and 6315 of the California Labor Code.

The substance of the People's case in what has been labeled by petitioner as the second prosecution, Municipal Court Number 413019, can probably be gleaned only through an independent review of the evidence which the People submitted to defendants through discovery. In arriving at his determination to deny the defendant's motions to dismiss in People v. Lockheed Shipbuilding and Construction Company, et al., Number 413019, out of which the present proceeding arises, the

trial judge was compelled to hear approximately one and one-half days of testimony, read approximately 495 pages of Assembly Subcommittee Hearings containing testimony of witnesses to be used in Case Number 413019, read 365 pages of reports submitted to the City Attorney's Office primarily by the Division of Industrial Safety containing evidence of facts upon which Case Number 413019 is based, and then to read the Reporter's Transcript of the trial of Case Number 402085 which comprised approximately 2240 pages.

Among the conduct on June 22, 23, and 24, which will be proved in the People's case, is that which is set out in the report of the prospective testimony of four of the approximately thirty-five witnesses which the People intend to call in Case Number 413019. This report was filed as part of the People's Complaint in Case Number 413019 and provides as follows:

> "Wallace Zavattero will testify: That he is employed as a safety engineer by the State Division of Industrial Safety. That pursuant to his employment he made

inspections of the San Fernando Tunnel project in the City of Los Angeles, with the Lockheed Shipbuilding and Construction Company being the contractor of the project, and dealt with Loren Savage and Otha G. Ree, Jr., Lockheed employees. That on June 23, 1971 he made an inspection of the San Fernando Tunnel and subsequent to this inspection he made numerous safety orders authorized by law which were served on Loren Savage and Otha G. Ree, Jr., and other servants and agents of Lockheed. That Loren Savage, Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company did not comply with said orders. That on June 23, 1971, during the swing shift, Loren Savage, Otha G. Ree, Jr., and Lockheed Shipbuilding and Construction Company and each of them, permitted and required employees to work in the San Fernando Tunnel an unsafe place of employment, as a result of not complying with said orders.

"That on June 24, 1971, an explosion occurred in the San Fernando Tunnel which killed 17 persons, to wit:

ALDRICH, FORREST ELWOOD
ASHE, WILLIAM
BLAYLOCK, DANNY
CARRASCO, JOSE
CARTER, WILL
DROBOT, PAUL JOHN
DEMO, RONALD ERNEST
BALLOW, ROBERT
GUTIERREZ, MIKE
NICHOLS, GARY
OVERSTREET, RUSSEL M.
PETERS, JONATHAN V.
RICHARDSON, LOUIS
SPREEN, ALVIN
SNODGRASS, WILLIAM
STOWERS, ROBERT K.
WARNER, ROBERT

"The explosion and 17 deaths resulted from failure to comply with said orders."

(From the Complaint of Case Number 413019)

"Henry McIntyre will testify:

That on June 22, 1971, he was employed by Lockheed Shipbuilding and Construction Company and that Loren Savage and Otha G. Ree, Jr. were two of his Supervisors. That Russell Van Guilder was his immediate supervisor on the swing shift of June 22, 1971. That Russell Van Guilder permitted and required him to work in the San Fernando Tunnel, located in the City of Los Angeles, during the swing shift June 22, 1971. That he operated the mining machine during said shift. That approximately 5 hours before his shift ended he began to smell a strong odor of crude oil and gasoline. That as he excavated the odor got stronger. That the gas burned his eyes, nose and throat. That during the last hour the odor and gas made him sick. That he informed Russell Van Guilder of the above condition. That other workers complained about the gas burning their eyes, nose and throat.

That during the last hour of the shift he had to leave the machine four (4) times to get fresh air. That he knew that oil was present because he had previously worked in the oil fields and he could recognize the crude oil smell. That due to the gas and strong crude oil smell the tunnel was an unsafe place to work."

(From the Complaint of Case Number 413019)

"Arvid Rasmussen will testify:

"That on June 23, 1971 he was employed by Lockheed Shipbuilding and Construction Company and Loren Savage and Otha G. Ree, Jr. were two of his Supervisors. That Loren Savage and Otha G. Ree, Jr. and each of them required and permitted him to work in the San Fernando Tunnel, located in the City of Los Angeles, during the swing shift, June 23, 1971. That during this shift he operated a MSA 2A explosion meter while testing for explosive

gases. That he tested the atmosphere in the roof of the tunnel, first at approximately 5:30 P.M. and did not get a reading. That he tested the atmosphere on the left of the conveyor belt near the heading of the tunnel at the spring line and got a reading between 30% and 40%. That Mr. Savage was in the tunnel at the time of the reading. That he tested the atmosphere near the face of the tunnel, just above the muck and got a reading of 100%. That he also informed Mr. Savage of this reading. That he continued to test and get high readings and so informed Mr. Savage. That he informed Mr. Savage that many of these readings were over the lower explosive limit. That he did not know what type of gas he was dealing with and that samples should be taken. That Mr. Savage stated that he could take them the next day. That the atmosphere had a crude oil odor and it was very strong. That

the gas in the tunnel was burning the eyes, nose, and throat of many of the workers. That the odor and gas made several of the employees ill. That at approximately 9:30 P.M. a minor ignition occurred approximately 30 feet back from the tunnel face. The flame was approximately 3 feet long and originated between ground support segments. That the operation during the shift had been stopped numerous times due to the presence of rising gas concentration in the tunnel atmosphere. That every time the muck was moved, the odor and gas became very strong. That the gas appeared to be in the muck. That the entire tunnel and especially the heading smelled of a very strong gasoline and crude oil odor. That the tunnel was a very dangerous and unsafe place to work."

(From the Complaint of Case Number 413019)

"Ralph Brissette will testify:

"That on the graveyard shift of June 22-23 and on the graveyard shift on June 23-24 he was employed by Lockheed Shipbuilding and Construction Company as a brakeman in the San Fernando Tunnel. That his employment required him to direct trains in and out of the area of the tunnel where excavating work was taking place and to load the mine cars with excavated material. That his supervisor on the graveyard shift of the evening of June 22, 1971 and morning of June 23, 1971 was Eugene Pedigo and Loren Savage was present in the tunnel on the graveyard shift of the evening of June 23, 1971 and morning of June 24, 1971. That explosions occurred on the graveyard shifts of the morning of June 23, 1971 and the morning of June 24, 1971. That explosivemeter readings registered from 1 to 19% on the morning of June 23, 1971 and 100% on the morning of June 24.

That a wide assortment of ignition sources were present on both occasions including welding and cigarette smoking. That a strong odor of gas was present on both evenings the entire duration of the graveyard shift until both explosions occurred."

(From Complaint of Case Number 413019)

Approximately thirty additional witnesses are anticipated to be called by the People and will testify to conversations and activities which transpired on June 22, 23, and 24th in their employment, conduct of employees on the various shifts, conditions which were produced by the excavation procedure which was used, the lack of control and supervision for safety over personnel on June 22, 23, and 24th, geological conditions which should have been anticipated in excavating in the vicinity in which the San Fernando Tunnel was located, the presence of carbonasceous shales and petroliferous sedimentary rock, and various types of hydrocarbon gases,

the testing procedures, physical and chemical properties and explosive characteristics of these hydrocarbons chains.

After making a comprehensive review of all of the facts available relating to case number 413019 and all of the facts relating to case number 402085 the Municipal Court Judge in the proceeding out of which this action arises stated:

> "First of all turning to the motion under Kellett, pursuant to the Kellett decision, 654, regarding the facts in this case and the facts in the previous case arising out of the course of conduct on the 16th of July, I found that the only similarity between the two cases is that both involve the same four and a half mile, 22-foot diameter tube located in the San Fernando Valley. Very frankly, at that point in my estimation after having listened to the evidence and reading all of the material that I have indicated that I have read, I found very little similarity."

(Reporter's Partial Transcript of Proceedings of May 8, 1972.)
(Appendix "A" herein.)

The Judge in that matter then went on to enumerate, based on the facts of both cases as they were before him, the great degree of separation and large number of dissimilarities between the two cases. (See Reporter's Partial Transcript of Proceedings, pages A-4, A-5, A-6, A-7 and A-8 set forth and included infra herein.)

In both the testimony and the declarations taken before the respondent court, it was contended by the prosecutors that considering the complexity of the two cases and the great variance in the issues and proofs between the two it would have been virtually impossible to join both in a single action without undue complication. In testimony taken before the Municipal Court testimony was elicited in case number 413019 that had the two cases been attempted to be filed together they would have been subjected to an automatic motion for severance. In the hearings on the defendants' motions testimony was also

taken indicating that at the time of filing of Case Number 402085, the prosecution's preparation and assessment of the merits of Case Number 413019 was far from completion.

Thus, on May 8, 1972, the Municipal Court denied petitioners' motions to dismiss.

On May 12, 1972, petitioners filed proceedings in the Los Angeles Superior Court, No. C 29671, seeking a Writ of Prohibition to restrain the Municipal Court from proceeding with the trial of the second prosecution.

On May 15, 1972 the Superior Court denied and dismissed the petition.

On May 17, 1972 petitioners sought a Writ of Prohibition in the California Court of Appeal, 2nd Civ. No. 40323 which was denied on May 23, 1972.

A petition for hearing was filed with the California Supreme Court on or about June 2, 1972 which was summarily denied on June 29, 1972.

I

THE FIRST PROSECUTION, CASE NUMBER 402085, DOES NOT BAR PROSECUTION OF THE PRESENT CASE

The thrust of petitioners' argument, up until the present action, has been that multiple prosecution for offenses based on a continuing course of conduct should mandatorily be joined in a common action.

Petitioners have been denied recovery in the California courts where such a remedy is readily available for cases which it can properly be applied. (See Kellett v. Superior Court, 63 Cal.2d 833 (1966)).

Petitioners now seek this Court to formulate a compulsory joinder rule when, as the petitioners state, there is mere awareness as to "The basic facts underlying each and every one of the charges subsequently brought in the second prosecution." (Petition for Writ of Certiorari at p. 8.)

Petitioners have been denied recovery because the offenses charged in the second prosecution are based, NOT on the same conduct or same course of conduct, or the

same criminal episode or based on the same nucleus of facts, but on the contrary, the thrust of respondent's case in what has been termed the first prosecution is that Lockheed Shipbuilding and Construction Company, through Otha G. Ree, Jr. caused an "employment" to come into existence which was not safe, specifically:

> " . . . entering and requiring one Arvid Rasmussen, an employee, to enter the shaft and tunnel portion of a tunnel construction project in the Sylmar area of Los Angeles, California after said shaft and tunnel portion had been inspected and determined to be unsafe by the California State Division of Industrial Safety."
>
> (Taken from the complaint of case number 402085)

The charges in that case (number 402085) were based on the violation by Petitioners, Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr. of the state order which prohibited employment at the place known as the San

Fernando Tunnel. The violation of such an order constitutes a conclusive presumption of the absence of safety and constituted the prima facie case of guilt of the defendants of violations of Labor Code §§ 6400 et seq. in case number 402085.

"In any prosecution under this section, it is prima facie evidence of a violation of any such safety provision, that the accused has failed or refused to comply with any order, rule, regulation or requirement of the commission relative thereto. The burden of proof shall thereupon rest upon the accused to show that he has complied with such safety provision."

Labor Code §6414.

"All orders, rules, regulations, findings and decisions of the division made and entered under this part are admissible as evidence in any prosecution for the violation of any provisions of this part and shall in every such prosecution, be conclusively presumed to be

reasonable and lawful and to fix a reasonable and proper standard and requirement of safety unless, prior to the institution of the prosecution for such violation, proceedings for a rehearing thereon, or a review thereof, are instituted as provided in Chapter 4 of this part and not then finally determined."

Labor Code §6507 (Emphasis added)

No evidence of "dangerous levels of gas" or "inadequate ventilation" were necessary to establish the People's prima facie case in that action and, such evidence was, if admitted at all, limited to the purposes of showing why an order prohibiting employment had been imposed upon the location of the San Fernando Tunnel.

The notice of prohibition attached to the geographic location known as the San Fernando Tunnel on June 27, 1971 rendered it criminal to conduct the process of "employment" at that location. The notice of prohibition remained in effect on July 16, 1971 when Petitioners at that time

entered the forbidden area and allegedly required an employee to ply his employment of gas testing.

The notice of prohibition is commonly called a "yellow tag order" and is authorized to be imposed on a location by Labor Code §6510. The violation of such a prohibition is made criminal by Labor Code §6511. Those statutes provide in relevant part that:

> "When in the opinion of the division a place of employment, machine, device, apparatus, or equipment or any part thereof is in a dangerous condition or is not properly guarded or is dangerously placed, the use thereof shall be prohibited by the division, and a notice to that effect shall be attached thereto . . . ."
>
> Labor Code §6510.
>
> "Every person who, after such notice is attached as hereinabove provided, uses or operates any such place of employment, machine, device, apparatus, or equipment before it

is made safe and the required safeguards or safety appliances or devices are provided, or who defaces, destroys or removes any such notice without the authority of the division is guilty of a misdemeanor."

Labor Code §6511.

In addition to the yellow tag, a special order was issued by the Division of Industrial Safety under the provisions of §6313 of the Labor Code. Section 6313 provides in pertinent part:

"The division may investigate the cause of all industrial injuries resulting in disability or death which occur within the State in any employment or place of employment, or which directly or indirectly arise from or are connected with the maintenance or operation of such employment or place of employment.

"The division may make orders or recommendations with respect to the cause of such injuries which

are just and reasonable
. . . ."

Labor Code §6313.

This special order provided that no person was to be permitted to enter the proscribed portion of the San Fernando Tunnel without the presence of a representative from the State Division of Industrial Safety or without first obtaining written permission from the Division. It is this order which was to establish a prima facie case of violations of Labor Code §§ 6400 et seq. and a conclusive presumption of absence of safety in case number 402085. The conduct which was charged as violative of those Labor Code sections in case number 402085 was the act of entering the forbidden portion of the San Fernando Tunnel and requiring an employee to enter those premises and to carry on his employment process of gas testing.

The conduct charged in the present action bears no similarity to that charged in case number 402085. The conduct charged in the present case is the act of excavating and constructing a tunnel.

Not only does the "act" in the present case differ from that of case number 402085 but the objective and intent of the actor is also altogether different. In case number 402085 the objective and intent of the actor, Petitioner Ree, and Petitioner Lockheed, acting through Petitioner Ree, was to conduct a recovery operation. Upon this point all parties in case number 402085 agreed. The People contended that the actor, Petitioner Ree, entered the proscribed portion of the San Fernando Tunnel to recover a combustible gas indicator. The defendants contended that entrance was effected to recover a dead body. In the present case, the objective and intent of the actor was to construct a tunnel. Nor does the difference end in the analysis of the act or objective and intent of the actor.

The two prosecutions are based on two totally dissimilar events within which different standards of conduct applied. The standard of safety for recovery operations such as that being conducted by Petitioner Otha G. Ree, Jr. in case number 402085 differs appreciably from the

standard of safety required of actual construction and excavation operations which is applicable in the present case. In a case involving recovery operations the standard of "such freedom from danger to the life or safety of employees as the nature of employment reasonably permits" (Labor Code §6310) is obviously relaxed due to the fact that the "nature of the employment" is one which purportedly seeks for its purpose to render an employment safer, or to rescue the premises or employees from circumstances which are endangering. On the other hand an excavation or construction operation is a "nature of employment" which has no such utility and the standard for safety has an entirely different application in such construction operations from that in rescue or recovery operations.

II

THERE IS NO FEDERAL RULE OF COMPULSORY JOINDER REQUIRING PROSECUTION OF ALL CRIMINAL OFFENSES ARISING OUT OF THE SAME TRANSACTION

Petitioners claim that the underlying policies of the double jeopardy and due process clauses should be used as a basis for a compulsory joinder rule. The reasoning behind petitioner's claims arise out of the emotional, mental and economical ordeal that the individual is made to endure.

Petitioner states that this would be "without prejudice to the state or defendant." (Petition for Writ of Certiorari, p. 11.)

In the present case, as is set forth herein, the state would have been extremely burdened were it required to join the separate and independent transaction which was charged in case number 402085 to the presentation of the present case. The two separate events and the explanation of the two separate standards of safety for these two separate and individual instances would

have caused undue confusion and complication and would have deprived both parties of a fair and impartial trial by enlightened, understanding, and properly informed trial jurors. A trial of both cases would only confuse the jury in an already complicated case. Furthermore the federal test relating to joinder of distinct offenses where there is a continuous course of conduct is, whether each action would require proof of facts not required by the others. Ashe v. Swenson, 397 U.S. 436 at 446 (1970).

In the case of United States v. Miller (D.C. Pa. 1966) 250 F. Supp. 294 at 296 the court in distinguishing the double jeopardy clause from charges arising out of substantially the same events that gave rise to the previous indictment (similar to petitioner's contention) states:

> "Defendant's claim of double jeopardy turns on whether the present prosecution is essentially a relitigation of a former prosecution which failed. The same offenses may be involved in two prosecutions although they are

labeled differently. (cases cited)

"Where a new prosecution follows an acquittal, the dangers to be prevented are the harassment to the defendant and the unfairness of permitting the prosecutor a second crack at a conviction following an abortive first effort. See Abbate v. United States, 359 U.S. 187, 196-201, 79 S.Ct. 666, 3 L. Ed.2d 729 (1959) (separate opinion of Brennan, J.).

"The defendant argues that this prosecution, arising as it does out of the same acts from which the earlier prosecution arose, must necessarily be a rehash of the same issues. On this record, it cannot be said that this is so. The jury might, it is true, have acquitted Miller of the former charges because it found he was not gambling at all and thus did not accept any of the embezzled money. But it might equally have found that he was a gambler and did take the money, but was unconnected

with the embezzlement. It is impossible to know which facts were found favorably to defendant and were relied on by the jury. To conclude from the acquittal that the jury rejected the Government's evidence that defendant gambled would be at least as conjectural as concluding that it did find him to be a gambler but acquitted him on other grounds. It would also mean that even spurious and incredible defenses raised in a criminal trial would be deemed to have been resolved in defendant's favor if he gets an acquittal on any ground. The unsoundness of such a position is patent.

"The nature of the offenses charged in the present indictment and the proof required to sustain a conviction based on them are both quite different from what was involved in the earlier trial. Cf. Morgan v. Devine, 237 U.S. 632, 639, 35 S.Ct. 712, 59 L.Ed. 1153 (1915). There is no rule requiring

compulsory joinder of charges arising out of the same transaction. Compare, Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965). Double jeopardy, therefore, is no ground for quashing this indictment." (Emphasis ours.)

Although this case preceded Ashe v. Swenson, 397 U.S. 436 (1970) the point that is raised and that was raised by this Court's opinion in Ashe, is that the rule of collateral estoppel in criminal cases should not be applied in a hypertechnical manner. A mandatory joinder of all criminal offenses "growing out of a single criminal act, occurrence, episode, or transaction," (Cf. the concurring opinion of Mr. Justice Brennan, Ashe v. Swenson, supra at 453, 454) would not afford a realistic or rational approach to this case.

Petitioner cites Ashe v. Swenson, supra and Green v. United States, 355 U.S. 184 (1957), both cases arising from a single act or criminal episode occurring concurrently in time. In Green, supra, the defendant was prosecuted for arson and murder

in both the first and second degree arising out of the same act. Defendant was convicted of second degree murder. Upon retrial after an appeal and reversal, he was once again retried on first degree murder. The Court, stating the basic policy behind the double jeopardy rule, reversed the second trial. In Ashe, supra, defendant purportedly robbed six (6) individuals. The prosecuting attorney attempted to conduct multiple separate trials for each of the individuals robbed. After an acquittal in the first trial defendant was tried for robbery of one of the other individuals. The Court, relying on a collateral estoppel rule, as embodied in the Fifth Amendment guaranty against double jeopardy, did not allow the second trial.

Thus, in our case, the defendants allege that there is an underlying or continuing course of conduct where actually there is, as the trial judge stated:

> " . . . regarding the facts in this case and the facts in the previous case arising out of the course of conduct on the 16th of July, I found

that the only similarity between the two cases is that both involve the same four and a half mile, 22-foot diameter tube located in the San Fernando Valley. Very frankly, at that point in my estimation after having listened to the evidence and reading all of the material that I have indicated that I have read, I found very little similarity. The first case involved the removal of evidence from the tunnel on the 16th of July and the alleged furnishing of employment that was unsafe at that particular time. The present case involves the gross negligence of defendants Ree and Savage and defendant Lockheed, alleged to have caused the deaths of 17 individuals and the safety factors that existed on the 22nd and 23rd and 24th of June, and I found in regard to the safety factors that in my mind the safety conditions are far different on the 22nd, 23rd and 24th and even on each of those

days as compared to each other as contrasted to the safety conditions that were existent in the tunnel on the 16th." (Emphasis ours.)

(Reporter's Partial Transcript of Proceedings of May 8, 1972, Appendix "A" herein)

The facts that were litigated in the first prosecution that may have to be reintroduced are the basic facts relating to the nature of the area, i.e., the tunnel, its location, etc.

This is not a relitigation of a prosecution that failed, it is merely a re-entry into evidence of basic facts. An analogous situation would be one in which an officer cited an individual during his course of employment for traffic violation on one day in one particular spot and then three weeks later cited the same individual in concert with several others during the course of their employment at the same spot for another violation. The cases should not mandatorily be joined simply because of some underlying similarity and there would

be no concept of double jeopardy that has ever been propounded by American courts that would proscribe the second prosecution. In both situations there is a similarity of offense and location but there will not be a relitigation of the same issues.

In any case, there is a similarity as to the location of the offense but the issues to be litigated and the standards of conduct to be proven are in no way identical.

III

IF A COMPULSORY RULE OF JOINDER WERE FORMULATED AS A CONSTITUTIONAL MANDATE, SUCH A RULE WOULD BE INAPPLICABLE TO THE FACTS OF THIS CASE

Petitioner is proposing an extension of the double jeopardy or due process clause that would bar subsequent prosecutions against an individual, if the prosecution does not include all criminal offenses against an individual which are known to the prosecution at the filing of the initial prosecution, if they arise out of a continuous course of conduct.

This is an extension of the rule of law proposed by Justice Brennan in the recent case of Ashe v. Swenson, 397 U.S. 436 (1970).

Justice Brennan extended the double jeopardy clause beyond the rule as established by the majority wherein an implied collateral estoppel doctrine was promulgated from the double jeopardy clause. Justice Brennan argued that if the second prosecution arose out of the same criminal episode as the first prosecution it was barred from prosecution.

In relying upon Green v. United States, 355 U.S. 184 (1957) as the basis for his decision Justice Brennan made extensive use of overly broad language wherein the state became a conglomerate of power with unlimited resources to combat a single individual. In effect, the State may have unlimited resources but the chance concentration of all of those resources upon an individual is an extremely tenuous argument to use as a basis for such a far reaching decision. In some circumstances the reverse is true, wherein the individual is able to hire an unlimited amount of

private legal counsel and the individual public attorney is not only burdened by lack of time to complete the requisite preparation for the case but is usually cramped in his legal resources and working space.

Justice Brennan does validly state that an individual should not be subject to continual embarrassment, expense and ordeal for multiple prosecutions for the "same offense". Ashe, supra, at 450.

The "same offense" being, as Justice Brennan would proffer, all acts arising out of a single criminal act, occurrence, episode, or transaction. Cf. Ashe, supra, at 453-454.

Although this is a concurring opinion, the petitioner accords considerable weight to this theory as it would, as the learned Justice states, "prohibit vexatious multiple prosecutions".

The respondent asserts that petitioner falsely places its reliance upon Justice Brennan's opinion since this would not preclude the present litigation.

Petitioner is not placed, a second time, in jeopardy on the key questions of the trial. Collateral estoppel does not operate where, as here, the second trial is on a separate cause of action and the facts upon which the second prosecution is sought to be estopped are merely evidentiary of location.

The People in this case have to prove anew each element of each different offense in the second prosecution to the satisfaction of the jury. During this process certain facts that were placed into evidence at the first prosecution will, of necessity, have to be proven at the second prosecution. But, in any case, because the tunnel is continuously there and because it is unsafe on two different occasions does not mean that the actors who enter the tunnel at these two different and distinct times have established a continuous course of conduct.

In considering a Federal Compulsory Joinder rule it will be necessary to review the various state rules presently in effect. California in the case of Kellett v. Superior Court, 63 Cal.2d 822 (1966) has established a rule whereby separate offenses that are part of an individual course of conduct where the intent and objective of the defendant are similar, shall be tried together.

The present case has been distinguished from this type of a rule with the use of the following California cases that have

defined and given specificity to the Kellett, supra, rule.

In the post-Kellett case of People v. Van Lotta (1968) 258 Cal.App.2d 329, the court disapproved an allegation of multiple prosecution based on Penal Code §654 and Neal v. State of California (1960) 55 Cal. 2d 11. In Van Lotta the defendant, a parolee, was arrested for parole violation and possession of marijuana along with three others in a house in Newport Beach. In that house in Newport Beach, in plain sight, marijuana and marijuana paraphernalia were found. Approximately six hours after the defendant's arrest the officers searched defendant's residence in Garden Grove and found approximately four more pounds of marijuana. This search was conducted to find other evidence of parole violation in connection with narcotics.

The defendant was charged, tried and convicted on August 11, 1966 for possession of marijuana with intent to sell. This conviction was for the marijuana found in Garden Grove.

On August 22, 1966, eleven days after

conviction on the Garden Grove marijuana a new and separate trial commenced on possession of the Newport Beach marijuana. The defendant was charged here with Health and Safety Code §11530 (possession of marijuana).

The defendant contended that the two offenses were part of an indivisible course of conduct and that the second trial should be barred as a multiple prosecution. The Court answered this contention by stating:

> "Defendant's intent and objective respecting the marijuana in the Garden Grove house was distinct from his intent and objective respecting the marijuana in the Newport Beach house. As to each offense the specific conduct evidencing possession was different; the purpose was different; and the subject matter of the possession was different.
>
> "It is proper to note the offense of possession of the marijuana in the Garden Grove garage was a continuing offense, occurring

through conduct constituting actual possession . . . while defendant was in the house, and through conduct constituting constructive possession while he was in Newport Beach. However, this fact does not furnish a basis for holding the possession incident to the Garden Grove offense and the possession of the marijuana in Newport Beach were parts of an indivisible course of conduct. Each offense was the product of an independent transaction.

" . . . In the case at bench the offense at Garden Grove and the offense at Newport Beach were not offenses in which the same act or course of conduct played a significant part. Noteworthy, in addition to what heretofore has been stated regarding this matter, is the fact that prosecution of the Newport Beach offense involved four defendants actually participating in or aiding and abetting the offense. Defendant's conduct

at the Newport Beach house encompasses actual possession of the marijuana in the pipe, and joint participation with the other defendants in possession of the marijuana on the table as well as aiding and abetting them in the commission of that offense."

People v. Van Lotta, supra, pp. 340, 341.

Obviously in determining the Van Lotta case, supra, the Court noticed certain facts; that each offense constituted a violation of the defendant's parole, that in each offense the subject matter was marijuana, and that although there was a six hour time span between the uncovering of the evidence for each offense, and the intent was different for each offense, the offense theoretically occurred at the same time.

The facts of the case at bar are surprisingly analogous to the facts of the Van Lotta case, supra. Instead of Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company breaching its

obligations under parole in two separate instances, they were breaching their obligations to maintain a safe place of employment for their employees on June 22, 23, 24, 1971 and July 16, 1971.

Instead of two different pieces of marijuana there is a tunnel with two different statuses. The status on June 22, 23, and 24, 1971, was a tunnel untagged by the Division of Industrial Safety and being used for mining and excavation. However, on July 16, 1971, the tunnel was "yellow tagged" by the Division of Industrial Safety disallowing any admittance or work to be done in the tunnel without permission of the Division.

Here, like Van Lotta, supra, the intent and purpose for each offense was different. On June 22, 23, and 24, 1971, the intent of the actors was to mine and excavate. The purpose was to complete the tunnel pursuant to their contract with Metropolitan Water District. On July 16, 1971, the intent of the actors was to enter a tunnel where no mining and excavating was allowed with the purpose of either recovering a body or concealing evidence.

In Van Lotta, supra, the Court explains as a differentiating fact between the two offenses the joint participation of the three other defendants in one of the offenses and not in the other. The facts are similar here, on the June 22, 23, and 24, 1971 offenses there is joint participation by three other defendants, Loren G. Savage, Eugene Pedigo and Russell Van Guilder. On July 16, 1971, there is only Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company.

In the cases following Kellett v. Superior Court (1966), 63 Cal.2d 822, the facts constitute the doing of one basic act that constitutes separate offenses. This one act only takes a matter of minutes to a few hours. The first and second prosecutions are against one person acting alone.

The facts in the case at bar are far different from any of those cases determined under the Kellett Rule. In this case:

(1) The acts occurred more than three weeks apart, one was June 22, 23, 24, 1971 the other was July 16, 1971.

(2) There was no activity at all in

the San Fernando Tunnel during the major part of this time period. (3) The actors, as a whole, were different on the days in question: on June 22, 23, 24, 1971, they were Russell Van Guilder, Eugene Pedigo, Loren G. Savage, Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company; on July 16, 1971, it was only Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company.

It is apparent that Kellett v. Superior Court, supra, was never meant to apply to this type of factual situation.

CONCLUSION

That the California rule against multiple prosecutions is broader than any constitutional proscription is obvious from a reading of the California statute and cases on the matter. It is equally obvious from a perusal of the complaints in this matter and a reading of the Reporter's Transcript of the facts and rulings by the lower court judge set out at Appendix "A" herein that

neither the national nor the state proscriptions apply to a case such as the present one.

For all of the reasons contained herein it is urged that the petition for writ of certiorari be respectfully denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney

DAVID M. SCHACTER,
Deputy City Attorney

RICHARD M. HELGESON
Deputy City Attorney

By: RICHARD M. HELGESON

Attorneys for Respondent.

APPENDIX A

APPENDIX A

(REPORTER'S PARTIAL TRANSCRIPT CONTAINING THE LOWER COURT'S RULING AND THE BASIS AND REASONS THEREFOR)

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

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HON. GEORGE W. TRAMMELL III, JUDGE

DIVISION NO. 2

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY, A CORPORATION DOING BUSINESS IN CALIFORNIA, LOREN G. SAVAGE, OTHA G. REE, JR., RUSSELL VAN GUILDER AND EUGENE PEDIGO, Defendants.	No. 413019

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REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

MONDAY, May 8, 1972

(see next page)

MADELAINE NEUWIRTH, C.S.R.
Official Reporter

APPEARANCES:

For the People:	ROGER ARNEBERGH City Attorney By: ROOSEVELT DORN Chief Trial Deputy RICHARD M. HELGESON Deputy City Attorney LARRY B. MOSS Deputy City Attorney
For Defendant Lockheed:	O'MELVENY & MYERS By: DAVID G. FINKLE, Esq.
For Defendant Savage:	BALL, HUNT, HART, BROWN & BAERWITZ By: MICHAEL J. MALONEY
For Defendant Ree:	HOLLOPETER & TERRY By: DON H. TERRY, ESQ.
For Defendant Pedigo:	KARL K. RANSOM, ESQ.

(Defendant Van Guilder not present nor represented by Counsel.)

LOS ANGELES, CALIFORNIA, MONDAY, MAY 8, 1972, 10:00 A.M.

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THE COURT: This is People versus Lockheed Shipbuilding and Construction Company; Loren G. Savage; Otha G. Ree, Jr.; Eugene Pedigo.

All parties defendant are represented through counsel. People are present.

We are here for a determination of the motions by the defendants, all joined, to dismiss the 60 counts contained in the Complaint, and arriving at the decisions that I have, I have considered the voluminous points and authorities, declarations and written arguments, the testimony of Mr. Helgeson, Mr. Bane, read approximately 495 pages of Assembly subcommittee hearings, 365 pages of reports submitted to the City Attorney's office primarily by the Division of Industrial Safety, and then I have read 2,240 pages of transcript approximately of the previous trial and then heard arguments on Friday.

Let me say that I commend all attorneys for their ability and the degree of preparation on the case. It certainly has made my job much easier, and it's a

degree of ability and preparation which is very uncommon in criminal law.

As I said on previous occasions, I have, and I think with the concurrence of all parties, listed the grounds into four general categories: a motion pursuant to the Kellett decision coupled with 654 of the Penal Code, a single course of conduct barred by multiple prosecutions; two, res judicata, collateral estoppel; three, what is in the nature of a Rost motion or unnecessary delay in bringing the case to trial, i.e. actually filing the case; and lastly, lack of speedy trial violations of the defendants' Sixth Amendment rights.

I am going to take each one of them one by one and give my decision and my reasons on each of the grounds.

First of all turning to the motion under Kellett, pursuant to the Kellett decision, 654, regarding the facts in this case and the facts in the previous case arising out of the course of conduct on the 16th of July, I found that the only similarity between the two cases is that both involve the same four and a half mile, 22-foot diameter tube located in the San Fernando Valley. Very frankly, at that point

in my estimation after having listened to the evidence and reading all of the material that I have indicated that I have read, I found very little similarity. The first case involved the removal of evidence from the tunnel on the 16th of July and the alleged furnishing of employment that was unsafe at that particular time. The present case involves the gross negligence of defendants Ree and Savage and defendant Lockheed, alleged to have caused the deaths of 17 individuals and the safety factors that existed on the 22nd and 23rd and 24th of June, and I found in regard to the safety factors that in my mind the safety conditions are far different on the 22nd, 23rd, and 24th and even on each of those days as compared to each other as contrasted to the safety conditions that were existent in the tunnel on the 16th.

First of all, on the June dates the presence of individuals in the tunnel was known. There was some doubt to the extent -- number one, whether or not it was known that anybody was in the tunnel on the 16th of July, or if they were known, it was not known by very many people. There were mining operations going on in June. There

were none going on in July. Apparently, as I gethered -- at least it is somewhat alleged that the mining operations were releasing the gas and that this may have been at least part of the cause of the explosion. Also the lack of inspections at both times is far different in the degree of safety in inspection. It was far greater in my opinion on the 22nd, 23rd and 24th than it was on the 16th with regard to the entire tunnel.

The ventilation conditions on both dates were drastically different primarily because of the nonoperation of the tunnel on the 16th of July and also the damage sustained to part of the ventilation system, and I believe also, if I'm not mistaken, there was some rectifying of the reversal of the fans by that time. At least they were not able to be reversed on the 22nd, 23rd and 24th.

The damage to the tunnel is a major factor in my opinion, although I don't base my decision solely on that as to that particular ground. The tunnel was undamaged except for the minor damage caused by the flash explosion on the 23rd of June. The damage to the tunnel on the 16th as a result

of the major explosion was considerable in my opinion from what I was able to glean from the statements and the testimony.

The possibility of collapse was far greater in the tunnel on the 16th than it was on the 22nd and 23rd and up to and prior to the explosion on the 24th.

The factors of rescue and the safety factor that would go along with adequate rescue preparations were far different on the respective dates.

The electrical system in my opinion was completely different and also the debris.

I think also that in my mind as I looked at the evidence that there is cer-· tainly the inference that I draw that there was an easier proof of safety violations and lack of safety would be easier on the 16th of July than it might be on the 22nd, 23rd and 24th.

Because of the things that I have mentioned and the fact that there had been a blast which had done considerable damage to the head of the tunnel versus the lack of safety alleged to exist on the 22nd, 23rd and 24th, while I suppose a blast in and of itself might be some indication of lack of safety, I'm not convinced that that

is dispositive of the particular issue, and I think that the proof of that issue would be much more difficult than it would have been in the first case.

Also we have present in this case the element of gross negligence, which was not present in the first case, and also the element, an important element, of causation, that is, with regard to the death under 6416 of the Labor Code, which is obviously not present on the 16th. It is present here, which I think makes a material difference not only factually, but in the element of proof.

Therefore, with regard to ground No. 1, I find that it lacks merit.

Ground No. 2, res judicata, collateral estoppel. The Court finds that there is no merit to such contention of the defendants. I make no other comments. To some extent that is tied in with the reasons that I have given to the first ground.

The third and most difficult area is what is in the nature of a Rost motion, undue delay in bringing the case to prosecution, that is, the filing of the case.

I make the following findings in support of the following reasons: First of

all I find that there was no material prejudice to any of the defendants. I think that right from the very beginning the defendants knew or should have known of the possibility of these particular charges being filed. This is to me rather evident from the manner in which the subcommittee hearings of the Assembly in the early part of September and again at the latter part of September, the manner in which they were handled and some of the statements made between the members of the subcommittee and several of the attorneys and several of the witnesses.

Also I can't overlook the fact not only based on Mr. Finkle's statements to the subcommittee in September, but what is apparent to me, that Lockheed has from the very beginning conducted a massive investigation to determine the cause of the blast and whether or not in their opinion there was any violation of the safety conditions and if so, what could be done to rectify them.

Also I am not unmindful of the fact that there are, apparently from statements made here and alluded to to some extent in the written arguments, civil cases pending

or the possibility of civil proceedings or proceedings in the nature of civil actions pending and that dealing with the actual facts of this case as distinguished from the facts of the first case, which to me again revolved only about the removal of the gas tester and the alleged furnishing of an unsafe place of employment and the retrieval of that item on that date.

Also I'm not unmindful of the fact that apparently the defendant, at least the defendant Lockheed, has had at its availability methods of discovery different in this case from the ordinary criminal case in that they because of the pending civil and quasi-civil proceedings have been able to exercise or had the opportunity to exercise the use of depositions, which is ordinarily except under very unusual circumstances not afforded to either party in a criminal case.

Therefore, I find, as I say, that I don't believe there is any showing of undue or unjust prejudice to any of the defendants. I don't believe that the mere passage of time under these factual situations is sufficient for me to make such a finding.

Now, with regard to delay in initiating the prosecution, I find that such delay in my opinion was justified.

As a Judge, and one who at one time was a prosecutor, I have always felt that the charging process in the hands of the prosecutor is one of the most important functions, that charging should not be resorted to unless there is an adequate basis to file the charges. I feel that the prosecutor owes not only a duty to the public to file charges which he feels that he can sustain in a trial and not merely on mere suspicion or feeling that a charge should be filed or that a person is guilty, but that he should do so only when he feels that he has a reasonable basis for believing that he can sustain a conviction. At the same time I think a prosecutor in the charging process owes a duty to the proposed defendants not to file hastily a case that would not be supported by evidence as of that time. Certainly in this case I think this is a classic example where a hasty filing without a thorough investigation before the filing, the possibility of resulting in a not guilty verdict, and I'm not making a finding as to what I might think would be

the situation in this case, would have been not only in my opinion unfair to the individual defendants, their reputations in the industry in which they have been engaged for a long time, but certainly would have been unfair to defendant Lockheed, not only the corporation, but its shareholders.

In my opinion the case here is one of the most complex and complicated cases that I have ever seen filed in the Municipal Court and in the Superior Court. Not only is there a vast number of conflicts with some of the witnesses with regard to what I consider to be possible material aspects of the case involving the actual blast, but you have a problem as to how far you are going to go with regard to affixing responsibility, how far down the line you go, how far up the line you go, to what extent are the acts of the employees to be imputed to the corporation Lockheed. These are all very difficult areas and one on which you cannot in my opinion make hasty decisions from reading reports such as I did in the last week.

The area itself, dealing with mine safety and the geophysical aspects, the engineering aspects, certainly is ordinarily

out of the realm of the competence of any person ordinarily engaged in the field of criminal law. I feel that this is something that would have to be taken in consideration.

I therefore find that with regard to the third issue or third grounds there was no undue prejudice to the defendants and that in my opinion the delay was justified and not unreasonable.

As to the last ground, lack of speedy trial violation of the Sixth Amendment, the Court finds there is no merit to the contentions of the defendant.

Therefore, the Court finds that as to all defendants on all grounds the motions to dismiss are denied.

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IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

DIVISION NO. 2 HON. GEORGE W. TRAMMELL III, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY, A CORPORATION DOING BUSINESS IN CALIFORNIA, LOREN G. SAVAGE, OTHA G. REE, JR., RUSSELL VAN GUILDER, and EUGENE PEDIGO, Defendants	No. 413019

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, Madelaine Neuwirth, Official Reporter of the Municipal Court, Los Angeles Judicial District, County of Los Angeles, State of California, do hereby certify that the foregoing pages 1 to 10, inclusive, comprise a true and correct partial transcript of proceedings had in the matter of the above-

entitled case, taken on May 8, 1972.

/s/ Madelaine Neuwirth
Official Reporter